



December 5, 2022

The Honorable Lauren McFerran
Chair
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Roxanne L. Rothchild, Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Re: Regulatory Information Number 3142-AA21

Dear Chair McFerran and Ms. Rothchild:

On September 7, 2022, the National Labor Relations Board (NLRB) proposed a rule that would expand the joint-employer definition under the National Labor Relations Act. The rule would extend liability to employers that have indirect and reserved control over one or more employees' essential terms and conditions of employment. The National Association of Insurance and Financial Advisors (NAIFA) appreciates the opportunity to submit comments to the NLRB on the Standard for Determining Joint-Employer Status.

Role of Independent Contractors in the Insurance Industry

Founded in 1890 as The National Association of Life Underwriters ("NALU"), NAIFA is the oldest, largest, and most prestigious association representing the interests of insurance professionals from every Congressional district in the United States. Our mission – to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members – is the reason NAIFA has consistently and resoundingly stood up for agents and called upon members to grow their knowledge while following the highest ethical standards in the industry.

The majority of NAIFA's members – insurance producers, broker dealer representatives, and/or independent registered investment advisors – are independent contractors who provide vital financial benefits and insurance services to consumers across the country. It is estimated that



independent contractors account for at least one of every seven insurance agents, financial advisors, and securities agents.

Financial professionals have the freedom to choose from many affiliation models and can decide whether they wish to engage in an employee model or an independent contractor model. Many of NAIFA's members are independent contractors and small business owners. They choose to be an independent contractor financial professional, rather than an employee of their carriers, because it gives them the ability to focus on establishing and growing a small business that is focused on their clients and their employees, and to build equity for themselves and their families.

There are over 130,000 independent contractors who own and operate financial advisory and insurance brokerage firms, employing more than 330,000 employees.¹ Many of these business owners are able to build equity in the firms they own. Removing the option to work as independent contractors would severely disrupt these businesses and eliminate many of these jobs.

Between 2015 and 2019, independent contractors in the financial services sector created approximately 54,000 new businesses and 174,000 new jobs, all or most of which would not have existed if independent contracting were prohibited.

Independent contractor-operated financial advisors and insurance agencies account for approximately 27% (\$47 billion) of the output of the financial advisory and insurance brokerage industries. Reducing the supply of these services would harm consumers, including by reducing financial literacy and harming their ability to accumulate wealth and save for retirement.²

NAIFA's independent members have full control over their schedule, employees, benefits, and more, giving them the same responsibility as other business owners. They also have control over the types of financial products they recommend and sell, the number of clients they serve, and the amount of time they spend performing professional duties. This enables them to create a practice that serves their community and clients, helping American investors save for the future. In a survey of NAIFA members, approximately 95% of respondents indicated they wished to remain independent contractors under existing regulations.

Independent insurance producers, brokers, and financial advisors have a long history of being independent contractors and not employees for purposes of determining the applicability of federal and state wage and benefit provisions. These professionals are typically highly trained,

¹ Bureau of Labor Statistics, "Occupational Employment and Wages, May 2021: 41-3021 Insurance Sales Agents" (March 31, 2022) https://www.bls.gov/ia/g/tgs/ia_g52.htm

² Ibid



highly educated, highly regulated professionals who want to own their own small businesses and assume the risks and rewards of doing so. They maintain their own offices, purchase their own insurance, hire employees, pay employment taxes, and purchase workers' compensation insurance for their employees. They enter into written agreements with insurance companies and/or independent broker-dealers that carefully set forth the terms of their independent contractor status.

The independent contractor/statutory employee model is the distribution model that most insurance companies and producers adhere to within the industry. This working model is essential to providing consumers with the greatest protection and access to insurance products.

The Proposed Rule

NAIFA is concerned that NLRB's new joint employer standard is too vague and broad, providing no guidance for contracting parties on how to comply or avoid liability. NAIFA recommends that NLRB clarify and limit the types and degrees of indirect and reserved control that would now trigger joint-employment liability. Additionally, NLRB should work to resolve any conflicts with existing federal requirements. NAIFA also believes a new assessment of compliance costs resulting from the proposed rule should be conducted. If these areas cannot be addressed adequately, NAIFA recommends providing an exemption or carve-out of the proposed rule to maintain the integrity and functionality of existing insurance commerce and financial advisement.

The proposed rule lacks clarity on the essential terms and conditions of employment that are relevant to the joint employer inquiry. The rule suggests an inconclusive, open-ended list of such terms and conditions. Without meaningful guidance, insurance producers and financial advisors could never be sure that they have considered all the potential terms and conditions of employment that may be deemed "essential" in the joint employment inquiry.

The expanded standard can potentially target any third-party contractual relationship that involves indirect or reserved control from an inexhaustive list of terms and conditions. Proposals that redefine the methodology used to determine joint-employer status should exempt insurance and financial professionals from over-arching standards that do not address economic realities in the insurance industry.

Additionally, altering the joint-employer methodology without carving out the insurance industry creates the concern among independent contractors that such proposals put forward will create a slippery slope argument that has the potential to alter the way independent insurance producers, brokers, and advisors are viewed by legislatures and the judiciary.



Many of these insurance professionals have relationships with multiple insurance companies and financial institutions, which could make altering the existing economic realities test and reclassifying them as ‘employees’ problematic. The current independent-contractor relationship ensures consumers have the greatest access to products, services, and advice.

Independent contracting plays an essential role in the financial services and insurance industry, especially in customer-facing occupations such as licensed financial advisors, brokers, and insurance agents. Independent insurance agents constitute 17.1% of the entire insurance agent labor force while independent financial advisors account for 11.4% of the total number of advisors.³

Independent insurance producers and independent financial advisors are vital to ensuring that millions of Americans have access to important financial benefits. These professionals are deeply rooted in their communities and are best positioned to understand the needs of consumers. To reclassify and force them into a joint-employment relationship drastically limits not only their autonomy, but the availability of products they can provide their clients.

If you have any questions or require additional information, please contact NAIFA’s Director of Government Relations, Michael Hedge, at mhedge@naifa.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence Holzberg". The signature is fluid and cursive, written in a professional style.

Lawrence Holzberg, LUTCF, LACP
President
National Association of Insurance and Financial Advisors

³ U.S. Bureau of Labor Statistics, “Current Population Survey: Contingent Worker and Alternative Employment Arrangements May 2017” (available at https://www.census.gov/data/datasets/time-series/demo/cps/cps-supp_cps-repwgt/cpscontingent.html).